IN THE
MISSOURI SUPREME COURT

MARK CHRISTESON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85329
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF VERNON COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT, GENERAL DIVISION
THE HONORABLE DAVID DARNOLD, JUDGE

APPELLANT'S REPLY BRIEF

William J. Swift, MOBar #37769
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original Statements are incorporated here.

ARGUMENT

I. REBUTTING THE STATE'S EVIDENCE

All of Mr. Christeson's Points Relied On comply with this Court's rules while clearly presenting a single issue in each one.

This Court should give no deference to the findings of a motion court judge who the Vernon County electorate voted out-of-office, did not "retire", and who in Mr. Christeson's case adopted verbatim respondent's 171 pages of proposed findings. This Court should not consider respondent's strategy arguments presented throughout for the first time on appeal as substitute findings of a motion judge because this Court's rule requires it to review a motion court's findings.

Carter's prior bad acts were admissible evidence to rebut and impeach the credibility and veracity of respondent's portrayal of Carter as someone who without Mr. Christeson's involvement was not capable of committing the charged acts and were not propensity evidence. The evidence of Carter's bad reputation for truth and veracity was not cumulative to other evidence the jury heard.

Throughout respondent's brief it complains about Mr. Christeson's Points Relied On. Also throughout its brief, respondent relies on the credibility findings of a judge who the Vernon County electorate voted out-of-office, did not "retire," and adopted verbatim the respondent's 171 pages of proposed findings. Additionally throughout for those "findings" where counsel Ms. Leftwich was

found not credible, respondent substitutes for the first time on appeal strategy reasons for Ms. Leftwich's actions. Because these are reoccurring issues throughout respondent's brief they will be addressed once and only as part of this First claim.

Mr. Christeson is entitled to a new trial or at a minimum a new penalty phase because counsel failed to present evidence of prior bad acts of Carter that were admissible to rebut how Carter was portrayed as the follower who was not otherwise smart enough to commit these acts.

A. <u>All Points Relied Comply With This Court's Rules</u>

In Points I, IV, V, VI, IX, X, respondent complains about Mr. Christeson's Points Relied On. All of Mr. Christeson's Points Relied on Comply with Rules 30.06 and 84.04, each present a single issue.

This Court has indicated the following: "A point relied on must meet three requirements: (1) it must state the trial court's action or ruling about which the appellant complains; (2) it must state why the ruling was erroneous; and (3) it must state what was before the trial court that supports the ruling appellant contends should have been made." *J.A.D. v. F.J.D.*,978S.W.2d336,338(Mo.banc 1998). All of Mr. Christeson's Points Relied On satisfy these three requirements. Mr. Christeson's Points Relied simply are not like and do not even remotely resemble the deficiencies identified in the cases respondent cited.

Even where this Court has found a party's Points Relied On deficient, this Court has ruled the merits when the issue presented was "clear." *State ex rel.*

Director of Revenue v. White,796S.W.2d629,630 n.1(Mo.banc1990). Respondent responded to each and every claim about which Point Relied On it complained, and therefore, the specific issue in each point was clear and requires a merits ruling. When a procedural rule that is not firmly established and regularly followed is applied to adversely impact a defendant's rights, the due process clause is violated and the claim is reviewable in federal court. *Ford v. Georgia*,498U.S.411,422-24(1991). To not fully review as properly presented and preserved Mr. Christeson's claims, when the issues are so clear, would mean a rule that is not firmly established and regularly followed was applied.

B. Verbatim Adoption of Respondent's Findings By A Judge Lacking Constitutiuonal Authority To Serve

Throughout respondent's brief, it relies on motion court "findings" that the testimony of trial counsel Ms. Leftwich was not credible (*See*, *e.g*.,Resp.Br.43,80-82,91,96). Respondent then offers for the first time on appeal its speculation that certain actions constituted specific kinds of strategic decisions by Ms. Leftwich (*See, e.g*. Resp.Br.43-44,80-84,91,96-97). These "findings" lack any constitutional legitimacy because they were rendered by a former judge who lacked constitutional authority to serve and who did not exercise any independent judgment when he signed verbatim the State's 171 page proposed findings.

The Vernon County electorate voted Judge Darnold out of office (Point VIII). According to respondent being voted out-of-office equates with "retiring" and Mr. Christeson did not "contest" that Judge Darnold was "retired"

(Resp.Br.85,87). Mr. Christeson's original brief made very clear that Judge Darnold was not qualified to serve because he did not "retire" from his elected office, but rather he was removed from his position as a judge when the Vernon County voters elected his opponent (App.Br.102-06).

In *Russell v. Missouri State Employees' Retirement System*,4S.W.3d554(Mo.App.,W.D.1999), the Court was required to determine the "time of retirement" for purposes of calculating the retirement benefits of a former judge, who voluntarily resigned his office. In the *Russell* opinion, the Court noted that it looks to the plain and ordinary meaning of words used when construing a statute. *Russell*,4S.W.3d at 556. That Court then noted Webster's College Dictionary defined "retirement" as follows: '"withdrawal from work, business etc. because of age."' *Russell*,4S.W.3d at 556 (quoting Webster's New World College Dictionary (3rd ed. 1997)). *Accord Black's Law Dictionary* 5th ed. (1979) at 1183 ("retire" means "To terminate employment or service upon reaching retirement age."). Judge Darnold did not withdraw from his judicial position because of age, he was removed from his judicial position when the Vernon County electorate voted him out-of-office. Judge Darnold did not "retire;" he was defeated in a contested judicial election, and that is why his findings have no constitutionally sanctioned authority. Judge Darnold, unlike the judge in *Russell*, did not voluntarily choose to relinquish his judicial duties and as can happen to other elected officials, he was voted out-of-office.

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*,408U.S.238(1972). Post-conviction proceedings must comport with notions of fundamental fairness secured by due process. *Thomas v. State*,808S.W.2d364,367(Mo.banc1991) (a movant is entitled as a matter of due process to disqualify for cause a biased judge). The United States Supreme Court has viewed with contempt the practice of judges merely adopting a party's proposed findings. *See United States v. El Paso Natural Gas Co*.,376U.S.651,656 n.4(1964). This Court, while addressing this issue, has stated that "[t]he judiciary is not and should not be a rubber-stamp for anyone." *State v. Griffin*,848S.W.2d464,471(Mo.banc1993).

In *State v. Kenley*,952 S.W.2d250,281(Mo.banc1997), Judge Stith dissented noting that when a motion court signs the state's proposed findings there should be evidence that the motion court exercised independent judgment. In *Kenley*, Judge Stith believed there was reason to question whether the motion court had in fact exercised independent judgment and she would have ordered the case remanded for a new 29.15 hearing and for independent findings. *Kenley*,952 S.W.2d at 284. The factors that supported a lack of independent judgment were: (1) adoption of the respondent's 29 pages of complex findings; and (2) the State's findings uniformly found every State's witness credible and every defense expert not credible. *Kenley*,952S.W.2d at 284. Judge Stith noted that she found "it exceedingly indicative of a lack of independent judgment that the motion court

made all of them [the findings] in exactly the terms suggested by the attorney general." *Kenley*,952S.W.2d at 284.

Judge Darnold's findings should be given no deference because they reflect a lack of independent judgment. He adopted verbatim the State's 171 page proposed findings (R.L.F.545-715) as his "findings" (R.L.F.772 -941). To adopt verbatim 171 pages is exceedingly indicative of a lack of independent judgment. *See* Judge Stith's *Kenley* opinion. Copied repeatedly throughout the "findings" are rulings that when trial counsel Ms. Leftwich testified she could offer no reason for failing to do something that it was alleged she should have done that she was not credible because she continued to be an advocate for Mr. Christeson (R.L.F. 772 - 941). In contrast, whenever Ms. Leftwich provided testimony that was harmful to a postconviction claim the "findings" found her testimony credible strategy reasons evidencing effective representation for not doing matters it was alleged she should have done (*See, e.g.*, R.L.F.801-02, 907-09, 915-16). The lack of independent judgment in the rulings on Ms. Leftwich's testimony is reflected by the uniform finding that she was not credible when she stated she could not offer a reason for failing to do something, but was eminently credible when she had strategic reasons that were harmful to claims alleged. *See* Judge Stith's *Kenley* opinion.

Throughout respondent's brief, as to claims in which Ms. Leftwich's testimony was found not credible or otherwise denied, respondent proffers for the first time on appeal and speculates on what it claims to have been Ms. Leftwich's

"strategy" reasons for not taking actions it was alleged she should have done (*See*, *e.g.*, Resp.Br.43-44,64-65,69-73,75,77,81-84,91). Rule 29.15(k) provides that appellate review of a motion court's findings "shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." This provision calls for this Court to review the motion court's findings and not substitute findings the respondent now offers on appeal. *Cf. Chambers v. State*,781S.W.2d116,117(Mo.App.,E.D.1989)(strategy findings that are not based on counsel's testimony are unsupported and "mere speculation").

C. Rebutting Respondent's Follower Portrayal of Carter And Carter's Bad Reputation For Truth And Veracity

Respondent asserts counsel acted reasonably because it was Mr. Christeson's responsibility to supply counsel with the names of witnesses who could have rebutted respondent's portrayal of Carter as the follower and presented evidence of his bad reputation for truth and veracity (Resp.Br.19-20)(relying on *Middleton v. State*,103S.W.3d726,740(Mo.banc2003)). It is counsel's responsibility to investigate evidence and witnesses helpful to a defendant's case. *Terry Williams v. Taylor*,529U.S.362,369,395-98(2000); *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). It was counsel's responsibility to locate the witnesses who could have testified.

This case is unlike *Middleton* because there the defendant would have been expected to tell his counsel that certain jailhouse slang used against him had a particularized non-threatening meaning and that other inmates could explain that

meaning. *Middleton*,103S.W.3d at 739-40. There is no reasonable basis for believing that Mr. Christeson should have known that certain people who had associated with Carter would be familiar with Carter's reputation for truth and veracity and acts evidencing he was not a follower. All four witnesses, Amanda Burgess, Amber Burgess, Kyle Burgess, and Christopher Pullen, knew Carter when Carter was living in the Farmington/Fredericktown area and not living in the same household as Mr. Christeson with David Bolin (Ex. 17 at 6-7;Ex. 18 at 6-8; Ex. 19 at 5-7,13;Sept.R.Tr. 31-32).

According to respondent, counsel acted reasonably because counsel Mr. McBride testified that he knew three weeks prior to trial that Carter was going to testify for respondent (Resp.Br.19). Counsel had three weeks to investigate these witnesses, but did nothing. Amber Williams Burgess was listed in counsels' continuance motion as someone, who after Carter's deposition was taken, might possess information to discredit Carter because Carter had identified her as a former girlfriend (T.L.F.445). Despite having identified Amber Burgess as someone who could possess information relevant to rebutting Carter, counsel did nothing during those three weeks prior to trial to determine what information Amber Burgess possessed. Amber Burgess is married to Kyle Burgess (Ex. 18 at 6). Amanda Burgess is Kyle Burgess' sister and Amber Burgess' sister-in-law (Ex.17 at 5). If counsel had only acted as reasonable counsel and investigated Amber Burgess, then they would have also uncovered the information Kyle Burgess and Amanda Burgess possessed because the Burgesses are all related to

one another. Reasonably competent counsel who had three weeks notice would have obtained from all of the Burgesses and Christopher Pullen the information they could have furnished to rebut respondent's portrayal of Carter. *See Ervin v. State*,80S.W.3d 817,827(Mo.banc2002); *Wiggins v. Smith*,123S.Ct.2527,2537(2003); *Parker v. Bowersox*,188F.3d923,929-31(8thCir.1999). Mr. Christeson was prejudiced because there is a reasonable probability that he would not have been convicted of first degree murder or at a minimum not sentenced to death.

Respondent only tells this Court that Kyle Burgess' testimony included that Carter's reputation for truth and veracity was "none" (Resp.Br.20). What respondent failed to tell this Court is that Kyle Burgess also testified that Carter's reputation for truth and veracity was "Very low." (Ex. 19 at 13).

The respondent claims that Mr. Christeson was not prejudiced by the failure to call Kyle Burgess because his testimony would have shown Carter was only violent when a peer "encouraged" him to be violent which fit within respondent's theory (Resp.Br.21). Kyle Burgess' testimony (Ex.19) does not include any incident where Carter acted violently after he was "encouraged" to engage in such behavior.

The respondent claims that the incident where Carter attacked Kyle Burgess with a knife, but did not finish the act, would have reinforced that Carter was only following Mr. Christeson's directions (Resp.Br.21-22). What respondent does not tell this Court is that Kyle Burgess testified that the reason Carter did not get to

finish the attack on him was that either Kyle's friends or the police stopped Carter or Kyle ran away (Ex. 19 at 12).

Respondent asserts that because Amanda Burgess did not specifically know what the St. Francois County deputies had said about Carter her testimony lacked any value (Resp.Br.24-25). Amanda Burgess knew that Carter had a bad reputation for truth and veracity and her knowledge was based on both her familiarity with him through school and hearing about Carter from St. Francois County deputies during her participation in the Explorers program through the St. Francois County Sheriff's Department (Ex. 17 at 7,11). While Amanda did not pay close attention to what the deputies said about Carter, she knew that mention of his name meant he had been in trouble (Ex. 17 at 11). Amanda Burgess had a dual basis for her knowledge about Carter and her testimony would have been helpful, especially if it had been presented in conjunction with testimony from Amber Burgess, Kyle Burgess, and Christopher Pullen.

Christopher Pullen testified that Carter "was just always running his mouth, threatening people, things like that." (Sept.R.Tr. 33 L.17-18). That was followed by Mr. Pullen testifying that he had heard about Carter getting into fights (Sept.R.Tr. 34 L.15-16). Contrary to respondent's assertion (Resp.Br.26), this testimony does show that Carter had a reputation for violence and turbulence because he instigated fights with his mouthing-off. Simply because Mr. Pullen had not seen Carter in those fights in no way reinforces respondent's portrayal of

Carter as the follower (Resp.Br.26-27), as all it means is that Mr. Pullen was not present when the fights happened.

This Court has recognized that "One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State*,80S.W.3d at 827. *See, also*, Wiggins v. Smith,123S.Ct. at 2537 (counsel has duty to investigate and rebut aggravating evidence); *Parker v. Bowersox*,188F.3d at 929-31 (counsel was ineffective for failing to present evidence that would have rebutted aggravating circumstance that victim was a potential witness against Parker in two cases). Mr. Christeson's counsel requested a continuance to investigate Carter's version of what took place and his reputation for veracity (T.L.F.437-40,443-47; Aug.'99Tr.2-22). Even though counsel had identified Amber Burgess in their continuance motion as someone who might possess information to rebut Carter (T.L.F.445), counsel failed to investigate her. If counsel had investigated Amber Burgess, then they would have also found the information that Kyle and Amanda Burgess possessed. *See* discussion, *supra*.

Respondent relies on *State v. Wolfe*,13S.W.3d248,258(Mo.banc2000) to claim that evidence about Carter's violent behavior, sexual assaults, and drug dealing constitute inadmissible bad character evidence (Resp.Br.21,26). In *Wolfe* this Court noted that it is impermissible generally to impeach a witness with evidence of a bad reputation for morality or with specific acts showing moral degeneration. *Wolfe*,13S.W.3d at 258. Mr. Christeson's witnesses would not have

been called for the purposes prohibited under *Wolfe*. They would have been called to rebut respondent's aggravated portrayal of Carter as someone dominated by Mr. Christeson.

It is recognized that "[s]pecific acts of either misconduct or immorality, which may or may not have been the basis of a conviction, may be shown if the specific misconduct discredits the veracity of the witness." *State v. Pitman*,731S.W.2d43,48(Mo.App.,S.D.1987). In *State v. Ford*,623S.W.2d574,574-75(Mo.App.,E.D.1981), the defendant was convicted of two counts of first degree assault committed using a gun. During the defendant's testimony he "disclaimed ownership, use, or involvement with guns in any manner." *Ford*,623S.W.2d at 575. It was proper to allow the State to call a rebuttal witness to testify that in an incident that was not the subject of the charges then at issue, the defendant had told the rebuttal witness that he had shot someone. *Ford*,623S.W.2d at 575. This evidence was proper because the defendant had "attempted to portray a character of innocence in dealing with weapons. Thus, he exposed himself to a challenge of credibility in this regard." *Ford*,623S.W.2d at 576.

In Mr. Christeson's case Carter and respondent portrayed Carter as someone who was the follower and who was not otherwise smart enough to have committed this offense (App.Br.40-42). Because Carter and respondent portrayed Carter in this manner, evidence that Carter had committed violent behavior, sexual assaults, and drug dealing which demonstrated he was not just following Mr.

Christeson's lead and was intelligent enough to independently commit such acts was admissible to rebut, impeach, and discredit the veracity of how Carter was portrayed to the jury. *See Pitman* and *Ford, supra*. This evidence about Carter was admissible to rebut the favorable light in which both respondent and Carter sought to cast Carter as to his responsibility for this crime. Counsel was required to investigate and present that information. *See Ervin v. State*; *Wiggins v. Smith*; and *Parker v. Bowersox, supra.*

According to respondent, the evidence the absent witnesses could have produced about Carter's truthfulness was cumulative because the jury heard Carter admit that he had initially denied any involvement in this offense (Resp.Br.21). The evidence the jury would have heard, however, would not have been cumulative because the absent evidence would have impeached respondent's and Carter's portrayal of Carter as the follower who was not smart enough to have committed this offense. It was critical to specifically impeach that portrayal of Carter because respondent made those portrayals the centerpiece of its guilt and penalty cases against Mr. Christeson (*See* App.Br. at 40-42). While the jury heard Carter had lied when he denied any involvement in this offense, it was critical for the jury to also hear Carter had a bad reputation for truth and veracity generally in evaluating his portrayal of himself as a mere follower doing what Mr. Christeson told him to do.

This Court should reverse for a new trial or at minimum a new penalty phase because counsel was ineffective or a continuance should have been granted.

II. MICHAEL GIBBS WOULD HAVE REBUTTED AGGRAVATING EVIDENCE

Counsel was ineffective in failing to call Michael Gibbs because he never refused to testify and would have testified if counsel had merely supplied Mr. Gibbs with factually truthful accurate information that would have caused Mr. Gibbs to want to extend to Mr. Christeson his constitutionally guaranteed presumption of innocence.

The respondent argues that Ms. Leftwich, who in its findings was a witness that lacked any credibility as to claims for which she could not offer an explanation for why she failed to do things alleged in the 29.15 motion, but who in her testimony as to Mr. Gibbs was an exceptionally credible witness, exercised reasonable strategy in not calling Mr. Gibbs because he told her that he would say things that were hurtful to Mr. Christeson (Resp.Br.31-32 relying on Sept.R.Tr. 271 L.20 - 272 L.5 - testimony of Ms. Leftwich). The respondent also wrongly asserts that Ms. Leftwich acted reasonably because Mr. Gibbs "refused to testify" (Resp.Br.30,32 relying on Ex. 28 at13-14 - testimony of Mr. Gibbs).

Immediately after testifying that Mr. Gibbs indicated that he would say hurtful things, Ms. Leftwich's testimony continued as follows:

> Q. Now, Mr. Gibbs--Why did Mr. Gibbs have this particular animosity towards Mark, or why did he feel that he wanted to give this opinion?
>
> A. He indicated to me that he didn't feel it was right to kill women and children.

(Sept.R.Tr.272 L 16-20). All criminal defendants are accorded the presumption of innocence. *See Apprendi v. New Jersey*,530U.S.466,484(2000). When Rule 29.15 counsel furnished Mr. Gibbs with only the factually accurate and truthful information that a co-defendant was also charged and that Mr. Christeson had never given a confession, Mr. Gibbs was willing to give Mr. Christeson the benefit of the doubt and extend to him his constitutionally protected presumption of innocence (Ex. 28 at 15-17). After being provided that information, Mr.Gibbs did not attempt to offer things hurtful to Mr. Christeson during his Rule 29.15 testimony (Ex. 28). Ms. Leftwich did not act as reasonably competent effective counsel because if she had only provided Mr. Gibbs that same information, then he would have testified as he did in the Rule 29.15 case. Such actions by Ms. Leftwich would not have involved her lying or behaving unethically (Resp.Br.32-33), especially since she was the attorney who called Mr. Christeson to testify (Sept.R.Tr.359-60) and Mr. Christeson testified at trial he did not kill the Brouks (T.Tr.1413). Moreover, Rule 29.15 counsel did not obtain Mr. Gibbs' acquiescence to testify at the 29.15 proceedings by telling Mr. Gibbs that Mr. Christeson was innocent (Resp.Br.32).

The hurtful information that Mr. Gibbs threatened to offer was that he thought death should be imposed for killing a woman and her children (Sept.R.Tr.271-72). If counsel had merely furnished Mr. Gibbs with the truthful and accurate information 29.15 counsel furnished to Mr. Gibbs, then he would have testified as he did during the 29.15 case and not volunteered any hurtful

opinion. Counsel, however, knew that a witness was not allowed to recommend a punishment (Sept.R.Tr.272*). See Payne v. Tennessee*,501U.S.808,830 n.2 (1991). To fail to call Mr. Gibbs for this reason did not constitute reasonable strategy. *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

Ms. Leftwich's testimony also included the following:

Q. About Mr. Gibbs, you said that he did not want to help Mr. Christeson. Did he ever refuse to testify?

A. No.

Q. Or tell you, "I will not testify"?

A. No. He never said that.

Q. Okay.

A. He said he didn't approve of what he was charged with doing. Killing women and children he did not approve of.

(Sept.R.Tr.396). The testimony of the witness whose strategy respondent now relies on, Ms. Leftwich, expressly was that Mr. Gibbs never "refused" to testify. Instead, Mr. Gibbs was a reluctant witness who did not want to testify because the victims were a woman and her children.

The respondent claims that Mr. Gibbs' testimony would have had "minimal" value because Mr. Gibbs could only testify that Mr. Christeson had not made "a vague statement" (Resp.Br.31,33). That was not the State's position at trial. At trial, respondent's direct examination of Milner concluded as follows:

Q. (By Mr. Ahsens) Did you hear the Defendant, Mark Christeson, make some statement to Mr. Gibbs? Just yes or no.

A. Yes.

Q. And what was that statement?

A. I heard him say that "Of Course I did it, but they ain't got shit on me."

Q. Did you have any idea what he was referring to?

A. I had no idea at the time what he was talking about.

Mr. Ahsens: Nothing further of the witness.

(T.Tr.1576-77). The last thing the jury heard on direct examination was the statement Milner attributed to Mr. Christeson. The prosecutor did not think what Milner was reporting had only "minimal" value in asking for death.

According to respondent, Mr. Gibbs' credibility was "poor" because of his convictions (Resp.Br.31). The reason Milner was able to be called to testify was his criminal history placed him in jail with Mr. Christeson and Mr. Gibbs. Milner was in the jail at the same time because he was charged with stealing anhydrous ammonia to make methamphetamine (T.Tr.1577-78). Milner was convicted of stealing (T.Tr.1578). The jury should have been afforded the opportunity to decide whether to believe Mr. Gibbs or Milner.

The respondent relies on the finding that Mr. Gibbs was not credible (Resp.Br.32). It is irrelevant that there was a motion court finding that Mr. Gibbs was not credible because the issue is whether the jury might have found him convincing. *Kyles v. Whitley*,514U.S.419,449 n.19(1995).

Respondent refers to Mr. Gibbs as Mr. Christeson's "friend" (Resp.Br.32,33). There is no evidence in the record that Mr. Gibbs was a "friend" of Mr. Christeson. All the record shows is that, like respondent's witness Milner, Mr. Gibbs was confined at the Vernon County jail when Mr. Christeson was also confined there.

This Court should order a new penalty phase.

VI. MITIGATING EVIDENCE NOT PRESENTED

Counsel was ineffective because they failed to present a complete mitigation picture of Mr. Christeson when counsel presented dysfunctional family matters to the exclusion of Mr. Christeson's positive personal characteristics.

For several mitigation witnesses counsel failed to call respondent asserts counsel was effective because the evidence that could have been presented did not fall within counsel's mitigation theory of presenting evidence that Mr. Christeson came from a dysfunctional family (Resp.Br.66,70-72 - David Bolin, Laura Bolin, Dale Christeson). In *Terry Williams v. Taylor*,529U.S.362,369,395-98(2000) the Court found counsel was ineffective for failing to present available mitigating evidence, even though counsel had presented several mitigation witnesses, because counsel failed to present other types of available mitigation evidence. In *Terry Williams v. Taylor*, the Court indicated that in reviewing counsel's effectiveness, as to the mitigation case presented in a case, that courts are to assess the totality of the mitigation case that could have been presented and not judge evidence according to a single item of omitted evidence notion. *Terry Williams v. Taylor*,529U.S. at 397-99. What Williams recognized is that it is not effective representation to present a partial mitigation case. It was not reasonable for Mr. Christeson's counsel to present evidence of his dysfunctional family to the exclusion of evidence of Mr. Christeson's good character.

According to respondent, *Terry Williams v. Taylor*, stands for the proposition that good character evidence has little mitigation value (Resp.Br.63 citing *Terry Williams v. Taylor*,529U.S. at 369). In that portion of the opinion respondent cites, the Court notes that three witnesses were called to briefly describe Williams in positive terms and to say he was not violent. The Court did not suggest that such evidence has little mitigation value. Instead, the reason Williams' counsel were ineffective was they failed to also present an entire category of other extensive mitigating evidence of Williams' abusive and deprived childhood. *Terry Williams v. Taylor*,529U.S. at369,395. Mr. Christeson's counsel were ineffective because they failed to present the complete mitigation case that *Terry Williams v. Taylor* requires.

Respondent represents to this Court that it was reasonable to not call David Bolin because he could have testified that Mr. Christeson had sexually molested another boy (Resp.Br.66-67 relying on Ex. 10;at 31-33 Sept.R.Tr.262-63). That representation is false. This false representation is repeated in respondent's response (Resp.Br.81) to Point VII (counsel's failure to present complete evidence through Dr. Draper). On cross-examination of Mr. Bolin, he testified that Mr. Christeson's mother had told him that allegations had been made that when Mr. Christeson was thirteen years old (1992) he had engaged in inappropriate sexual conduct with a younger boy (Ex. 10 at 31-33). During counsel Ms. Leftwich's testimony she testified that she did not call Juvenile Officer Donald Nelson because she was concerned that Mr. Nelson might talk about an allegation of

sexual abuse that was made against Mr. Christeson (Sept.R.Tr.262-63). At the 29.15 hearing, Juvenile Officer for the Juvenile Court of the Twenty-Fifth Judicial Circuit, Mr. Nelson, who had worked in that position for twenty-four years, testified that he had investigated the allegation of sexual abuse against Mr. Christeson and based on that investigation he did not file a sexual abuse petition against Mr. Christeson (Sept.R.Tr.225-227). While there had been an allegation and investigation that when Mr. Christeson was thirteen he had engaged in inappropriate sexual conduct with a younger child, the investigating Juvenile Officer concluded that a sexual abuse petition against Mr. Christeson was not warranted.

For several of the mitigation witnesses, respondent asserts that it was reasonable for counsel not to have called them because some of the information they might have provided respondent can now on appeal spin in ways that might be viewed as unfavorable to Mr. Christeson (Resp.Br.64-65,67-69 - Terry Bolin, Carmen Bolin, David Bolin, Joseph Bolin). In *Terry Williams v. Taylor,*529U.S. at 396, the Court found that counsel was ineffective for failing to present mitigating evidence found in records even when other evidence that was objectively bad on its face would have also come into evidence as a result. That respondent can now find a way to recast favorable things mitigation witnesses would have said about Mr. Christeson does not excuse counsel's ineffectiveness.

An example of respondent's attempt to cast an unfavorable spin on appeal is that Terry Bolin testified that "appellant was mentally 'sharp as a tack' on some

things" (Resp.Br.64). From this respondent then tells this Court Terry Bolin's testimony was not mitigating because it showed that Mr. Christeson was "intelligent, reinforcing the state's theory that he was the leader in the crimes." (Resp.Br.64). Respondent's treatment of this testimony is expressly at odds with the *Terry Williams v. Taylor supra* requirement that reviewing courts are required to look at the totality of the mitigation case that could have been presented and not any single item in isolation. David Bolin testified that Mr. Christeson was "not too smart with books." (Ex. 10 at 8). Mr. Christeson's school records, which it is alleged that counsel was ineffective in failing to present (Point VII), objectively showed the following: (1) Missouri standardized testing for grades seven through ten - many categories in less than the bottom ten percent; (2) eighth grade reading score percentile rank of 2% and math 3%; and (3) a special education curriculum followed because of learning disabilities (App.Br.96-97 relying on Ex. 35 at 5,13,18-19). If counsel had presented a thorough mitigation case, then the objective records on Mr. Christeson's intellectual ability would have refuted any attempt to spin Terry Bolin's testimony to show that Mr. Christeson was the intelligent leader of this crime when compared to Carter.

This Court should order a new penalty phase.

XII. RESPONDENT'S CHANGE IN RESPONSIBILITY THEORY

Respondent presented two inherently factually contradictory theories of responsibility in the death of Kyle Brouk between Mr. Christeson's trial and the separate subsequent trial of codefendant Carter claiming in Mr. Christeson's trial that Mr. Christeson cut Kyle's throat and in Carter's trial that Carter cut Kyle's throat. The use of inherently factually contradictory theories requires reversal under *Smith v. Groose*.

According to respondent "nothing" in *Smith v. Groose*,205F.3d1045(8thCir.2000), "requires reversal of a first trial when an inconsistent theory is presented at a later trial." (Resp.Br.113). In *Smith v. Grosse*, witness Lytle gave testimony as to the timing of when the victims' were killed in Smith's trial that was diametrically opposed to Lytle's testimony at the subsequent trial of Cunningham, where the timing of the killings was a critical issue. *Smith v. Groose*,205F.3d at1048,1050-51. Summarizing what the State did the *Smith* Court noted: "In short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa." *Smith v. Groose*,205F.3d at 1050. The *Smith* Court held that "the use of inherently factually contradictory theories violates the principles of due process." *Smith v. Groose*,205F.3d at 1052. The *Smith v. Groose* Court reasoned that "[t]he State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Smith v. Groose*,205F.3d at 1051.

The State did the same thing here as it did in *Smith v. Groose*. At Mr. Christeson's trial Carter testified Mr. Christeson cut Kyle's throat (T.Tr.988-90). At Carter's subsequent trial, on cross-examination of Carter respondent suggested it was Carter who cut Kyle's throat (Ex. 34C at 505). On Carter's direct appeal, the Southern District concluded that respondent had in fact presented "simply two 'inherently factually contradictory theories."' *State v. Carter*,71S.W.3d267,272(Mo.App.,S.D.2002)(quoting *Smith v. Groose*,205F.3d1045(8thCir.2000)).

The State's representations about what *Smith v. Groose* prohibits are simply untrue. Unlike Carter though, Mr. Christeson was prejudiced for the reasons set forth in the original brief (*See* App.Br. at 124-25).

This Court should order a new trial on all counts or at a minimum order a new penalty phase on all counts.

CONCLUSION

For the reasons discussed in the original brief and this reply brief, Mr. Christeson requests the following: Points I, III, IV, IX, X, XII, a new trial or at minimum a new penalty phase; Point V a new trial; Points II, VI, VII, XI, XIII, XVII a new penalty phase; Points XIV, XV, XVI impose life in prison without parole; and Point VIII a new 29.15 hearing before a judge with authority to serve.

Respectfully submitted,

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William J. Swift, MOBar #37769
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855
FAX (573) 875-2594

Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains _____ words, which does not exceed twenty-five percent of the 31,000 words allowed (7,750) for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in February, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached reply brief and a floppy disk containing a copy of this reply brief were mailed, postage prepaid this _____ day of February, 2004, to Office of the Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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William J. Swift